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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

-vs-

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, CONNECTICUT, MISSOURI, NORTH CAROLINA, AND PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Seventh Circuit's conclusion that nude dancing is constitutionally protected speech, a federal question, decided in conflict with the state courts of last resort?

2. Is the regulation of public nudity a compelling state interest, within its police power?

3. Is the Indiana Public Indecency statute a valid time, place and manner regulation?

4. Does the Seventh Circuit's decision conflict with applicable decisions of this Court?

5. Is this an "as applied" challenge to the statute rendering the conduct involved unprotected by the First Amendment?

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INTEREST OF AMICI CURIAE

Arizona, Connecticut, Missouri, North Carolina, and Pennsylvania[1] have "indecent exposure" or "public indecency" statutes, ordinances or other regulations that are similar to the Indiana statute under review in this case. Like Indiana's statute, these laws proscribe public nudity in some manner. The opinion by the Seventh Circuit in this case is so broad that it arguably challenges the constitutionality of all the statutes of the undersigned states.

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1. The Commonwealth of Pennsylvania's legislative scheme does not generally prohibit public nudity; however, nude barroom dancing, the activity at issue here, is prohibited. For that reason Pennsylvania joins Argument V only.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The States joining in this brief all have similar or related "indecent exposure" or "public indecency" statutes, ordinances, or regulations. Because the United States Court of Appeals for the Seventh Circuit's opinion in this case is so broad and far-reaching -- starting down the road to a possible constitutional challenge of their own statutes -- these parties have filed a joint brief urging the Court to grant the petition and issue a Writ of Certiorari.

I

THE SEVENTH CIRCUIT'S CONCLUSION THAT NUDE DANCING IS CONSTITUTIONALLY PROTECTED SPEECH IS A FEDERAL QUESTION DECIDED IN CONFLICT WITH STATE COURTS OF LAST RESORT.

Nudity is not protected expression, but conduct, that states have a substantial interest in regulating via their police power. Koppinger v. City of Fairmount, 248 N.W.2d 708 (Minn. 1976). Nudity was

a traditional common-law crime, an act malum in se. Le Roy v. Sidley, 82 Eng. Reprint 1036 (1663); Truet v. State, 3 Ala. App. 114, 57 So. 512 (1912). Numerous state courts have held that "nude dancing" of the barroom variety is not protected. The petitioners set forth a list of the states that have rejected this claim that the First Amendment protects nude dancing. (Petition for Writ of Certiorari, pp. 14-16.) These State Supreme Courts are Indiana, Florida, Nebraska, Arkansas, Maine, Louisiana, and Michigan.

In addition, the Supreme Court of Tennessee has reached the same conclusion in City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983), wherein the court stated:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or

> prohibit any legitimate speech or expression entitled to First Amendment protection. It is a travesty to allow nude and crude public exhibitors of the human body, the privilege of asserting the rights of persons who contribute to society's permanent values and are entitled to First Amendment protection, and to read into a public indecency statute an intent to suppress free speech and expression.

645 S.W.2d at 403. As in the instant case, the dancers in McCoy made no claim that their conduct involved any speech or expression of ideas entitled to First Amendment protection. Id.

Other courts have reached the same result. In Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976), the plaintiff argued that the Texas statutes of "indecent exposure" and "disorderly conduct" could not be applied to her nude barroom performance. The district court rejected this argument and held that "the statutes in question are primarily directed at conduct." 416 F. Supp. at 1105.

II

REGULATION OF PUBLIC NUDITY IS A COMPELLING STATE INTEREST, WITHIN ITS POLICE POWER, AND ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.

The United States Supreme Court has recognized the right of cities and states to regulate offensive conduct in public places even though it may involve expressive activity or speech. United States v. O'Brien, 391 U.S. 367 (1968). This important right was recognized in Miller v. California, 413 U.S. 15 (1973):

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.

413 U.S. at 26 n.8. Even Justice Douglas acknowledged this in his dissenting opinion in Roth v. United States, 354 U.S. 476 (1957):

> No one would suggest that the First Amendment permits nudity in

> public places . . . . Government should be concerned with antisocial conduct, not with utterances.

354 U.S. at 512-13. It is also clear that:

> When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

O'Brien, 391 U.S. at 376. Therefore, assuming for the purpose of this argument that the nude "barroom" dance involves expression, it does not follow that all regulation of it is forbidden. Indeed, governmental regulation is permissible if certain conditions are met, as set forth in O'Brien:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

> restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

It is proper to analyze this case in light of O'Brien, because "speech" and "nonspeech" are combined in the same course of conduct. Nudity -- the condition or state of being unclothed -- is conduct or activity. Nudity is not protected expression, but conduct, which states have a substantial interest in regulating via its police power. Koppinger. However, dance may be classified as a form of expression under some circumstances. O'Day v. King County, 749 P.2d 142 (Wash. 1988); but see Dallas v. Stanglin, 490 U.S. ___, 109 S. Ct. 1591, 104 L. Ed. 2d 18, 25-26 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes - for

example, walking down the street, or meeting one's friends at a shopping mall -- but such kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons -- coming together to engage in recreational dancing -- is not protected by the First Amendment.") Thus, in this case, a combination of conduct (nudity) and possible expression (dancing) exist together and the four-prong test of O'Brien is applicable.

Does this regulation, Indiana Code Section 35-45-4-1, satisfy O'Brien? First, there can be no question that "regulation of indecent exposure and of conduct inducing to breaches of the peace are traditional and proper subjects of the police power . . . ." Kew v. Senter, 416 F. Supp. 1101, 1105 (N.D. Tex. 1976). Also, in United States v. Biocic,

730 F. Supp. 1364 (D. Md. 1990), the court found:

> In our system of government, the states and their subdivisions are the repositories of the general police power, which can be utilized to proscribe conduct that the community finds offensive to its sense of decency.

730 F.2d at 1366. This is the underlying authority on which the entire line of obscenity cases has been upheld. Cf. Miller v. California, 413 U.S. 15 (1973).

Nor can there be serious debate concerning the governmental interest at issue here. Certainly this regulation furthers an important or substantial governmental interest -- indeed, interests (in that they are numerous and established). One compelling interest is the preservation of the moral structure of society. The Court recognized this as a legitimate governmental interest in Bowers v. Hardwick, 478 U.S. 186 (1986), wherein the Court refused to invalidate

Georgia's sodomy law because the plaintiff claimed there was no rational basis for it:

> This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

478 U.S. at 196.

The Court has also approved the compelling governmental interest of maintaining a "decent society." As the Court recognized in response to the defendants' argument that any obscene materials used by "consenting adults" were constitutionally protected: "Rights and interests 'other than those of the advocates are involved' . . . there is a 'right of the Nation and of the States to maintain a decent society . . . .'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-60 (1973) (quoting Justice Reed,

Bread v. Alexandria, 341 U.S. 622, 642 (1950) and Chief Justice Warren, Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (dissenting opinion)). The Court went on to say:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

413 U.S. at 63.

Beyond the governmental interest in preserving society's moral structure and decency, the states have the further valid interests in preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct

attendant thereto. See California v. LaRue, 409 U.S. 109 (1972). Further, there is the paramount interest of preventing the sexual exploitation and degradation of women. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). These are all substantial interests and judicially recognized. The State of Indiana is entitled to rely on the experiences of other jurisdictions as a basis for this legislation. See Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

The third part of the O'Brien test is whether the governmental interest is unrelated to the suppression of free expression. O'Brien, 391 U.S. at 377. Clearly, the Indiana "public indecency" statute is unrelated to speech or its suppression. The regulation is aimed at conduct -- public nudity -- not speech.

Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

Finally, the restriction, if any, on First Amendment freedoms caused by this prohibition against public nudity is incidental and no greater than is essential to the furtherance of Indiana's legitimate interests. Not all nudity is proscribed, simply public nudity. The "actor" remains free to speak and express him or herself freely, but he or she "cannot appear with genitals or breasts exposed" while doing so. Crownover v. Musick, 509 P.2d 497 (1973). Therefore the statute meets the requisite condition of O'Brien and is constitutionally valid.

III

THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.

A governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free

speech. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Assuming that the "barroom" dancing at issue here is protected "speech" or "expression," content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. 475 U.S. at 47. A regulation is "content-neutral" if it is justified without reference to the content of the regulated speech. 475 U.S. at 48; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

There is a fundamental difference between statutes that are "content-based" and those that are "content-neutral." "Content-based" statutes focus on, and generally proscribe, certain unlawful speech. For instance, they proscribe the

distribution of obscene speech and the possession and dissemination of speech which is child pornography.[2] Such laws are based on objections to the "content" of the speech itself. It is unnecessary for a prosecutor to establish the harmful effects or consequences of such unlawful speech. Such speech has no protection under the United States Constitution.[3] "Content-based" laws generally seek to

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2. See, e.g., 18 U.S.C. § 1464 proscribing the distribution of obscene matter and 18 U.S.C. § 2251 proscribing the distribution of child pornography. Virtually all states have similar laws.

3. Miller v. California, 413 U.S. 15, 23 (1973) ("this much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"); New York v. Ferber, 458 U.S. 747, 753 (1983) ("child pornography . . . [is] a category of material outside the protection of the First Amendment").

eradicate the unlawful and constitutionally unprotected speech.[4]

Time, place, and manner regulation is primarily concerned with laws that are "content-neutral." Such laws focus on the negative secondary consequences or harmful effects that certain speech and speech related activities cause. These laws regulate the time, place, and manner of these activities in order to minimize or vitiate the harmful effects.

The statute under review in this case, Indiana Code Section 35-45-4-1, provides in pertinent part:

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4. For example, false advertising, speaking words which amount to a conspiracy or obstruction of justice, sedition, incitement, yelling "FIRE!" in a crowded theatre when there is no fire, using words which constitute a bribe, and committing perjury under oath. See Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

(a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

The substantial governmental interests in proscribing public nudity have been discussed previously, they include: preservation of the moral structure; right to a decent society; prevention of sexual assaults and prostitution; and elimination of sexual exploitation of women. The purpose of the Indiana

statute is to further these goals by prohibiting public nudity. It has nothing to do with content or speech. Under the facts of this case, plaintiffs are entitled to express any opinions or ideas they wish (although the record clearly demonstrates that they admit that they were not attempting to convey any message, other than to increase the patrons' thirst, as the District Court so found[5]). The state only requires that

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5. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context, to appear nude in public for money.

Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 418 (N.D. Ind. 1988).

they must wear a minimal amount of covering. Specifically, they may express political, scientific, artistic or prurient messages in their "dance," but they must be at least scantily clad in order to comply with the statute. This regulation is equally applied to others who might wish to respond. Renton, 475 U.S. at 48-49 ("The ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored, or more controversial views' [citation omitted].")

Further, these minimal or incidental requirements do not unreasonably limit alternative avenues of communication, nor do they significantly burden First Amendment rights. As the Ninth Circuit

stated in Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986), when discussing distance and stage requirements for barroom dancers:

> While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.

Similarly, the plaintiffs "message may be slightly less effective" wearing scant attire, however, the burden is insignificant. Thus the regulations are reasonable time, place, and manner restrictions that only slightly burden speech.

IV

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Indiana Supreme Court previously held this statute constitutional in State

v. Baysinger, 397 N.E.2d 580 (Ind. 1979). The facts in that case are almost identical to the ones at bar. Defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. 397 N.E.2d at 583. The Court responded:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any

pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances.

397 N.E.2d at 587 (emphasis added). Thus the court held, in light of the facts before them, that this type of "barroom" dancing was not constitutionally

protected. However, the court recognized that under certain other facts, nudity in public might be constitutionally protected expression. Again, the facts in Baysinger are identical to the facts of the present case.

Baysinger, by itself, only has precedential value for Indiana courts. However, on May 12, 1980, this Court dismissed the Baysinger appeal for want of a substantial federal question. State v. Baysinger, et al., sub nom. Clark v. Indiana, 446 U.S. 931 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975), a dismissal of an appeal from a state court upholding a state statute against federal constitutional attack, for want of a substantial federal question, is a ruling on the merits, with precedential force for all courts except the Supreme Court itself. Although the Seventh Circuit did not feel bound by precedent,

other courts have felt obligated to follow Baysinger. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983); Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980); and Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981).

Rather than speculating how the Supreme Court would rule on this issue (Majority Op. p.8, n.3), the Court of Appeals should have followed the precedent already established by Baysinger and Hicks.

V

THIS IS AN "AS APPLIED" CHALLENGE TO THE STATUTE AND THE CONDUCT INVOLVED HERE IS CLEARLY NOT PROTECTED BY THE FIRST AMENDMENT.

This case is a constitutional challenge to the Indiana "public indecency" statute, as applied to the plaintiffs' actions in three consolidated cases. In two of the cases, the activity complained

about -- barroom nude dancing -- took place in establishments that served alcohol. The third case, involving plaintiff Glen Theatre, did not involve the sale or presence of alcoholic beverages. The establishment in the latter case was destroyed by fire and that cause of action thereby became moot. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988); see DeFunis v. Odegaard, 416 U.S. 312 (1974).

The remaining cases involve licensed premises on which alcoholic beverages are dispensed. The Supreme Court has previously held that states, by virtue of the Twenty-first Amendment, have "wide latitude" in regulating nude and seminude entertainment within the confines of establishments that serve alcoholic beverages. California v. LaRue, 409 U.S. 109 (1972), reh. denied, 410 U.S. 948

(1973). Clearly, this statute as applied to the remaining plaintiffs is fully constitutional, since the Twenty-first Amendment comes into play and the Supreme Court has previously held that nude dancing can be banned from places that dispense alcoholic beverages.

CONCLUSION

For the foregoing reasons, Amici support the granting of a Writ of Certiorari in this matter.

Respectfully submitted,

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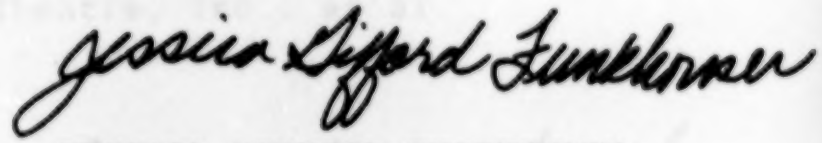

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